No. 80-1316

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOSETTE CLAIR BAUER, NEE GEISSER, *Petitioner*,

v.

UNITED STATES OF AMERICA AND HECTOR GRABER, CONSUL GENERAL OF THE GOVERNMENT OF SWITZERLAND, *Respondents*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT THE CONSUL GENERAL OF THE GOVERNMENT OF SWITZERLAND IN OPPOSITION TO THE PETITION

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QUESTIONS PRESENTED

1. Whether the court of appeals was correct in holding clearly erroneous the district court's finding that the best efforts promise had not been fulfilled?

2. Whether the court of appeals correctly held that a refusal by the United States to extradite petitioner, resulting in a violation of the Extradition Treaty with Switzerland, was not required in order to comply with the best efforts promise?

3. Whether the court of appeals properly recognized that petitioner's due process rights should not be subordinated to the duty of the United States to fulfill its treaty obligations?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 627 F.2d 745 (5th Cir. 1980).[1] The prior opinions of the court of appeals remanding the case to the district court (Pet. App. 63a-86a, 32a-55a) are reported at 554 F.2d 698 (5th Cir. 1977)[2] and 513

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[1] This opinion will be subsequently referred to as *Geisser III.*

[2] This opinion will be subsequently referred to as *Geisser II.*

F.2d 862 (5th Cir. 1975).[3] An earlier opinion of the district court following the first remand (Pet. App. 56a-62a) is reported at 414 F. Supp. 49 (S.D. Fla. 1976).

STATEMENT OF THE CASE

The Petitioner, Josette Bauer nee Geisser ("Ms. Geisser") is a Swiss citizen who escaped from prison in Switzerland on September 13, 1964. At the time of her escape, she had more than two and one-half years remaining of a sentence for aiding and abetting in the murder of her father for financial gain.

On August 31, 1967, Ms. Geisser was arrested in Miami, Florida attempting to smuggle twenty-eight pounds of heroin into the United States under an assumed identity and using a stolen passport. She was indicted by a grand jury for felony narcotics violations that could have led to sentences of thirty or forty years in prison.

The Government of Switzerland immediately instituted extradition proceedings under the 1900 Treaty of Extradition between the Government of Switzerland and the United States, 31 Stat. 1928 (Pet. App. 94a). After an extradition hearing held in the United States District Court for the Southern District of Florida in which Ms. Geisser and her counsel participated, the district court on November 2, 1967 issued an order certifying Ms. Geisser subject to extradition to Switzerland.

Subsequently, the United States Attorney in Miami, Florida entered a plea bargain with Ms. Geisser under which it was agreed that she would reveal information about the conspiracy to smuggle heroin in which she was

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[3] This opinion will be subsequently referred to as *Geisser I*.

involved and would testify against others involved in the conspiracy. In turn, the United States Attorney promised that Ms. Geisser would be paroled after three years and that the United States Government would use its "best efforts" to avoid her extradition to Switzerland or France. Thereafter, Ms. Geisser performed her commitments under the plea agreement and was sentenced to seven years' imprisonment.

On October 10, 1969, Ms. Geisser escaped from federal prison, having served just over two years of her seven-year sentence. Her escape occurred prior to the time at which her promised parole was to be granted. Almost three years later on June 25, 1972, Ms. Geisser was apprehended in Albuquerque, New Mexico where she was living under an alias. Ms. Geisser was convicted of escape in federal court and sentenced to a consecutive eighteen-month prison term for that escape.

In August 1973 Ms. Geisser filed a petition for writ of habeas corpus and a section 2255 motion, 28 U.S.C. §2255 (1976), to obtain release from imprisonment and to prevent her extradition. The district court granted Ms. Geisser's petition, ordering her discharged from detention and barring the United States from extraditing her (Pet. App. 28a-31a).

On appeal, the Court of Appeals for the Fifth Circuit in *Geisser I* vacated the district court's decision. It remanded the case for a declaration of position by the United States Government as to what action it intended to take to fulfill its bargain to use its best efforts to avoid Ms. Geisser's extradition (Pet. App. 51a-52a; 513 F.2d at 871-72).

Following the decision in *Geisser I,* the United States Government began to fulfill its promise to use its

best efforts to avoid Ms. Geisser's extradition. The Department of State had a number of communications with the Swiss Government and urged that it would be in the interests of both governments to terminate the case.[4] The Government of Switzerland maintained its request for Ms. Geisser's extradition and intervened in the case.[5]

After a hearing, the district court found that the plea bargain agreement had still not been fulfilled, granted Ms. Geisser her release, and issued an order barring her extradition (Pet. App. 61a; 414 F. Supp. at 52 (1976)).

In its 1977 opinion, the court of appeals in *Geisser II* again vacated and remanded the district court's decision. The court of appeals held that the promise to use best efforts to avoid Ms. Geisser's extradition had not yet been fulfilled and specifically set forth the type of presentation to be made by the United States to the Government of Switzerland in order to fulfill that promise (Pet. App. 74a-75a; 554 F.2d at 703).

After the decision of the court of appeals in *Geisser II*, the United States Government intensified its efforts to persuade the Government of Switzerland to withdraw its extradition request. As the court of appeals recounted in *Geisser III*,

> "a thorough and detailed letter was written by Peter F. Flaherty, Deputy Attorney General, to

[4] These communications between the Department of State and the Government of Switzerland are discussed in the opinion of the court of appeals in *Geisser II* (Pet. App. 68a-73a; 554 F.2d at 701-03).

[5] The text of the position of the Government of Switzerland is set forth in the third opinion of the court of Appeals, *Geisser III* (Pet. App. 19a-20a n.7; 627 F.2d at 754 n.7).

> Secretary of State Vance. The Secretary of State in a diplomatic communication to the Swiss Ambassador requested that the Government of Switzerland withdraw its extradition demand. This letter forwarded the Flaherty letter and adopted its contents. When the Swiss Government again refused to withdraw its request for extradition, two informal meetings were held in the Department of State" (Pet. App. 6a; 627 F.2d at 748).

The presentations by the United States Government to the Government of Switzerland to persuade it to withdraw its demand for Ms. Geisser's extradition covered in detail the four requirements set down by the court in *Geisser II* as necessary to constitute best efforts: (1) the reasons underlying the original bargain, (2) Ms. Geisser's performance in keeping her part of the agreement, (3) Ms. Geisser's intense fear of reprisals, and (4) the conclusion of the United States Government's agents that her fears were well founded (627 F.2d at 750-52).[6] In response to the United States' representations about Ms. Geisser's expressed fears for her safety, the Government of Switzerland made inquiry to the appropriate officials of the cantons that would be responsible for the execution of the remainder of Ms. Geisser's sentence and received strong assurances respecting Ms. Geisser's safety. The Government of Switzerland forwarded those assurances to the United States Government at the same time it informed the United States Government of its renewed request for Ms. Geisser's extradition.[7]

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[6] This portion of the opinion of the court of appeals in *Geisser III* was omitted from the opinion as reprinted in Petitioner's Appendix to her petition for writ of certiorari.

[7] The assurances of Ms. Geisser's safety and the representations of the outstanding record of safety of the prisons where Ms. Geisser would serve out the remainder of her sentence were discussed by the court of appeals in *Geisser III* (Pet. App. 16a-17a; 627 F.2d at 752).

On October 2, 1979, the district court again vacated the extradition order, ordered Ms. Geisser released from any form of detention, and authorized her to continue to reside permanently in the United States. The district court termed the efforts of the United States Government on Ms. Geisser's behalf as "nominal efforts" and declared that Ms. Geisser had been "the only moving force" since the issuance of the court of appeals' opinion in *Geisser II* (Pet. App. 88a).

In considering the appeal of the United States Government and the Government of Switzerland from the district court's October 2, 1979 order, the court of appeals unanimously ruled that the district court's finding that the United States Government had failed to use its best efforts to avoid Ms. Geisser's extradition was clearly erroneous. It found that the United States Government had fulfilled the four requirements that the court had stated in its 1977 opinion as necessary for the performance of the best efforts promise (Pet. App. 13a; 627 F.2d at 750-54). The court of appeals reversed the decision of the district court and reinstated the order for the extradition of Ms. Geisser.

REASONS FOR DENYING THE WRIT

I. The Court Of Appeals Was Correct In Holding Clearly Erroneous The District Court's Finding That The Best Efforts Promise Had Not Been Fulfilled, And This Court Should Refuse To Review This Issue On Certiorari.

Ms. Geisser asserts that the court of appeals wrongfully set aside as clearly erroneous the district court's finding that the United States Government had not fulfilled its promise to use its best efforts to avoid her extradition. The court of appeals was correct in its unanimous reversal of the district court.

The decision of the court of appeals in *Geisser II* clearly established that under the plea bargain agreement with Ms. Geisser the United States Government had promised only to use its best efforts to avoid her extradition and did not make an absolute promise that she would not be extradited (Pet. App. 74a; 554 F.2d at 703). In *Geisser II,* the court of appeals also set forth what would be necessary to fulfill that promise of best efforts, namely, a presentation by the United States to the Swiss Government of (1) the reasons underlying the original bargain, (2) Ms. Geisser's performance in keeping her part of the agreement, (3) Ms. Geisser's fear of reprisals if extradited, and (4) the conclusion of the United States Government's agents on the case that those fears were well founded (Pet. App. at 74a-75a; 554 F.2d at 703).

The decision of the court below that Ms. Geisser seeks this Court to review, *Geisser III,* carefully evaluated the performance of the United States Government in fulfillment of its best efforts promise against the standard established in *Geisser II* and correctly found that the promise had been fulfilled. The court of appeals' review of the performance by the United States Government in fulfilling its best efforts promise was facilitated by the fact that the record was comprised solely of documentary evidence.

As the court of appeals held:

> "It will be observed that the four requirements stated by this Court in its 1977 opinion were covered in detail. . . . "(Pet. App. 13a; 627 F.2d at 752).
>
> "It is the conclusion of the Court that these efforts undertaken by the United States government since the 1977 decision comply with the promise of the government to exercise its best efforts to avoid

> the extradition of Josette Bauer to Switzerland or France. These efforts precisely meet the requirements set up by this Court in its decisions in 1975 and 1977" (Pet. App. 20a-21a; 627 F.2d at 754).

Thus, the court of appeals was correct in reversing as clearly erroneous the district court's decision that the United States Government's efforts, set forth in detail in the Court's opinion in *Geisser III,* were "nominal" and that the Petitioner had been the "only driving force" since 1977 (Pet. App. 88a).

Because the decision of the court of appeals was a purely factual one and was entirely correct, this Court should not review that decision. Review would be inconsistent with the principle that the Court has frequently reaffirmed that it will not grant certiorari to review allegedly erroneous determinations of fact. *United States* v. *Johnston,* 268 U.S. 220, 227 (1925); *Southern Power Co.* v. *North Carolina Public Service Co.,* 263 U.S. 508 (1924). Furthermore, review in this case would be particularly inappropriate since the facts are unique and unlikely to be repeated and since the case involves the settlement of principles important only to the parties involved and not to the public at large. *See Rice* v. *Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 79 (1955); *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U.S. 387, 393 (1923). The court of appeals' decision is neither in conflict with any other decision of a court of appeals nor in conflict with applicable decisions of this Court. Thus, review of the decision by writ of certiorari is clearly inappropriate because there are no special and important reasons supporting such review. *See* Sup. Ct. R. 17.

II. The Court Of Appeals Correctly Held That A Refusal By The United States To Extradite Petitioner, Resulting In A Violation Of The Extradition Treaty With Switzerland, Was Not Required In Order To Comply With The Best Efforts Promise, And This Court Should Refuse To Review This Issue On Certiorari.

Ms. Geisser asserts that the court of appeals erred in holding that a refusal by the Executive Branch to extradite her was not necessary in order to comply with the best efforts promise by the United States Government. The court of appeals was correct in rejecting this contention.

On three separate occasions, the court of appeals found that Ms. Geisser's plea bargain required the United States Government to use its best efforts to avoid her extradition and rejected the contention that the plea bargain agreement included an absolute promise that she would not be extradited (Pet. App. 8a; 627 F.2d at 749; Pet. App. 74a; 554 F.2d at 703; Pet. App. 52a; 513 F.2d at 872). In *Geisser II,* the court concluded that the best efforts promise required the United States Government to make a strong presentation to the Government of Switzerland regarding Ms. Geisser's cooperation under the plea bargain agreement and the fears for her safety that she harbored (Pet. App. at 74a; 554 F.2d at 703). In *Geisser III,* the court concluded that that presentation had been made (Pet. App. 20a-21a; 627 F.2d at 754).

If, as Ms. Geisser argues, the "best efforts" promise obligated the Secretary of State not merely to seek to avoid Ms. Geisser's extradition by persuasion, but to prevent her extradition in any event, the promise would have been converted into the absolute promise not to extradite that the court of appeals on three occasions rejected as a factual element in the plea bargain. The best

efforts agreement, by its terms, was obviously not an absolute promise to prevent Ms. Geisser's extradition even if the Government of Switzerland insisted on United States compliance with Swiss rights under the Treaty of Extradition. 31 Stat. 1928 (Pet. App. 94a). The court below correctly determined that this best efforts promise by its nature could not be interpreted to prevent the United States Government from extraditing Ms. Geisser, thereby compelling the United States Government to violate its treaty and international law.

Ms. Geisser argues that the Secretary of State has the discretion not to extradite and should be required in this case to exercise that discretion in her favor. Assuming *arguendo* that the Secretary has limited discretion to refuse to extradite under United States law, a refusal would, of course, result in a violation of the United States' obligations to Switzerland under international law. The best efforts promise here in issue cannot be construed to mandate that result.

This issue, too, is purely factual and was correctly decided by the court below. This Court should not undertake to review it because of the principles set forth above.

III. The Court Of Appeals Properly Did Not Subordinate Petitioner's Due Process Rights To The Duty Of The United States To Fulfill Its Treaty Obligations, And This Court Should Not Review This Issue On Certiorari.

Ms. Geisser argues that the court of appeals erred by subordinating her due process rights to the fulfillment by the United States of its treaty obligations to Switzerland. She invites this Court to review the facts in this case, to reverse the factual findings of the court below, and thereafter to clarify its decision in *Reid* v.

Covert, 354 U.S. 1 (1957), regarding whether constitutional rights are supreme over treaty obligations.

The court below did not, however, subordinate Ms. Geisser's due process rights to United States treaty obligations, but, indeed, held just the opposite. Relying on both *Santobello* v. *New York,* 404 U.S. 257 (1971), and the plurality opinion in *Reid* v. *Covert,* 354 U.S. 1 (1957), the court of appeals specifically stated,

> "[i]f the United States government has not complied with the plea bargain, her [Ms. Geisser's] constitutional claim is a valid one and a purported treaty obligation of the United States government cannot override an individual constitutional right" (Pet. App. 10a; 627 F.2d at 750).

The court below specifically found, however, that because Ms. Geisser's plea bargain agreement had been fulfilled, her due process rights would not be violated by extradition. Thus, it found that no conflict existed between the fulfillment of United States treaty obligations and Ms. Geisser's due process rights (Pet. App. 20a-21a; 627 F.2d at 754).

This Court could reach the issue posed in *Reid* v. *Covert* — whether constitutional rights take precedence over the fulfillment of treaty obligations — only if it reversed the factual determination of the court below that the plea bargain agreement was fulfilled. The Court should decline petitioner's invitation to reexamine *Reid* v. *Covert* and address the question of balancing international treaty rights against constitutional rights in this case since the determination below rested upon a finding on unique facts and since the court below did not hold that constitutional rights were subordinate to the fulfillment of United States treaty obligations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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